Theta Cable of California *and* International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Petitioner. Case 31-RC-5141

May 28, 1982

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FANNING, JENKINS, AND HUNTER

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the Regional Director's Report on Objections issued on September 25, 1981.[1] The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Regional Director's findings and recommendations as modified herein.

The Regional Director recommended that the Employer's objections be rejected in their entirety on the ground that they were not served on the Petitioner in compliance with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, which requires, *inter alia*, that immediate service of copies of the objections be made on all necessary parties to the election. Alternatively, should the Board not adopt his recommendation on the service issue, the Regional Director recommended that the Employer's objections be overruled in their entirety on the merits. For the reasons set forth below, we reverse the recommendation that the objections should be dismissed for failure of proper service but we affirm the Regional Director's recommendation to overrule the objections on the merits.[2]

The facts as related in the Regional Director's report indicate that, on June 16, 1981,[3] Local 695 IATSE filed a petition for election in Case 31-RC-5121, involving certain employees of the Employer. On June 22, Local 659 IATSE likewise filed an election petition covering employees of the Employer. Both of these petitions were then withdrawn on July 9, and Petitioner IATSE, on that date, filed the instant petition, upon which the election was conducted on August 18. Thereafter, within the allotted time, the Employer served its objections to the election on the Regional Office. However, a copy of the objections was mistakenly served on Local 695 of the Petitioner rather than on the Petitioner itself. Subsequently, the Petitioner informed the Regional Office that it had not received a copy of the Employer's objections, and the Regional Office, in turn, informed the Employer of that fact on September 4. On that date, the Employer then served a copy of the objections on the Petitioner itself, some 10 days after the deadline for the receipt and service of all objections.

With respect to the reasons for the Employer's service of the objections on the wrong party, the Regional Director's investigation revealed that, on the evening of August 24, the day before the objections were due, the Employer's attorney, who was scheduled to be out of town to conduct unrelated business on August 25, instructed his secretary to type the objections the next day; then to have them reviewed; and finally to serve them "on the Union" on August 25. Thereafter, in preparing the proof of service and in serving the objections, the attorney's secretary concluded that she should serve the objections on Roy M. Brewer, a representative of Local 695 of the Petitioner, because the firm's correspondence and pleadings material contained a copy of a petition filed by Brewer in the above-mentioned Case 31-RC-5121, which appeared to her to be the most recent petition relating to the Employer. The material did contain an undated copy of the petition involved here, but it did not contain the Board's dated and numbered copy of the instant petition, which, in fact, had been served on the Employer by the Regional Office, and it did not contain certain other documents pertaining to the instant proceeding.

Based on the above facts, the Regional Director concluded that the Employer had failed to comply substantially with the Board's rules regarding the service of objections. In excepting, the Employer contends that an honest attempt was made to comply substantially with the requirements of the rules, and that service was in fact made upon the Petitioner as soon as the error in service was brought to the Employer's attention.

In *Auto Chevrolet, Inc.*,[4] the Board reaffirmed the principles enumerated in *Alfred Nickles Bakery, Inc.*,[5] that in order to support a variance or deviation from the clear requirements of our rules the objecting party must show "an honest attempt to substantially comply" with the Board's rules on the service of objections. The Employer did timely file its objections with the Region and also timely

[1] The election was held pursuant to a Stipulation for Certification Upon Consent Election. The tally was 20 votes for, and 0 votes against, the Petitioner; there were 7 challenged ballots, an insufficient number to affect the results of the election.

[2] The Employer filed four objections to the election. In the absence of exceptions to the Regional Director's recommended disposition of Objections 2, 3, and 4, we adopt *pro forma* the recommendation that those objections be overruled.

[3] All dates are in 1981 unless noted otherwise.

[4] 249 NLRB 529 (1980).

[5] 209 NLRB 1058 (1974).

served its objections on the party it thought to be the petitioner in this proceeding. While it was in error in this latter regard, that error was deemed an "honest mistake" by the Regional Director himself, and that error appears to have had its genesis in the contemporaneous withdrawal of certain petitions by locals of the Petitioner and the filing of the instant petition by the Petitioner. We cannot say that this unusual occurrence could not have created some confusion for the attorney's secretary who had to sort out the identity of the correct petitioner from the Employer's file. That the secretary erred was due to clerical inadvertence rather than any disregard for the Board's rules. Further, we note that, once the Regional Director notified the Employer that its attempted service had been unsuccessful, the Employer took immediate steps to effectuate proper service on the Petitioner.[6]

Therefore, in all the above circumstances, we think the Employer's objections should be considered.[7] Accordingly, we reverse the Regional Director's recommendation to reject the Employer's objections. Further, having considered the merits of Objection 1, which is the only objection before us, and the Regional Director's discussion of the merits of that objection, we adopt the Regional Director's recommendation to overrule the objection.[8] Accordingly, we shall certify the Petitioner.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following apropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All studio employees employed in the production of video tape programs, in maintenance and in broadcast engineering, employed at the Employer's Santa Monica and Ontario, California, facilities, but excluding all supervisors, guards, clerical employees, janitors and employees in the department known as "Public Access."

MEMBER HUNTER, concurring:

Contrary to the Regional Director, my colleagues conclude that the Employer made "an honest attempt to substantially comply" with the Board's rules on service of objections and hence that the objections should be considered on the merits. However, they agree with the Regional Director's further conclusion that the objections, once considered, do not warrant setting aside the election or require a hearing. Accordingly, they overrule the objections and issue a certification of representative.

I agree with my colleagues that a certification of representative should issue[9] in this case but I believe that, in finding the objections untimely for failure of proper service, the Regional Director did no more than follow current Board precedent as illustrated by the line of cases following *Auto Chevrolet, Inc.*, 249 NLRB 529 (1980).[10]

My colleagues' effort to avoid the application of *Auto Chevrolet* here by straining to distinguish the instant case on its facts succeeds only in one respect. Namely, they demonstrate the unworkability of the standard set forth in *Auto Chevrolet*, a standard which requires that the timeliness of service of objections turns on such elusive concepts as "honest attempt" and "substantial compliance." Indeed, if our experience with the approach endorsed by *Auto Chevrolet* shows anything, it shows that in practice these concepts mean different things to different Board Members and all without much regard for harmonizing the different results reached by panels in factually similar cases.

Perhaps nothing better illustrates the validity of this criticism of the *Auto Chevrolet* approach than an examination of *Glesby Wholesale, Inc.*, 259 NLRB 54 (1981), a case relied on by at least one member of the majority here in support of the conclusion that this Employer's objections should be considered. There, as here, the employer relied on "clerical inadvertence" to excuse noncompliance

[6] Member Fanning also relies on his separate statement in *High Standard, Inc.*, 252 NLRB 403 at 405, fn. 7 (1980).

[7] Cf. *Glesby Wholesale, Inc.*, 259 NLRB 54 (1981). Member Jenkins finds *Glesby Wholesale* plainly distinguishable. There, unlike here, there was no attempt at service and in his view the employer demonstrated a disregard of the Board's requirements rather than an honest attempt to comply substantially therewith. Similarly, the other cases relied on by Member Hunter are factually irrelevant.

[8] The Employer argues that the Regional Director erred by concluding that the Employer relied on *N.L.R.B.* v. *Savair Manufacturing Company*, 414 U.S. 270 (1973), in asserting that its Objection 1 should be sustained. We find it unnecessary to resolve this contention concerning the Regional Director's characterization of the Employer's position. From the facts set out in the Regional Director's report, it is clear that there was a waiver of initiation fees in this proceeding which was not conditioned on whether the employees joined the Petitioner prior to the election. Therefore, whether the initiation fee which was to be waived was that of a local of the Petitioner rather than the Petitioner's own fee is irrelevant. We find the objected-to statement was a legitimate organizing device and not—as the Employer argues—an impermissible bribe.

[9] Like the Regional Director and my colleagues I find the objections do not warrant setting aside the election or directing a hearing.

[10] See, for example, *Platt Brothers*, 250 NLRB 325 (1980), and *High Standard, Inc.*, 252 NLRB 403 (1980).

with the service requirements of Section 102.69 of the Board's Rules. Although a majority of the panel agreed, it is worthy of note that a dissenting opinion was filed by Member Jenkins, a member of the original *Auto Chevrolet* majority, pointing out that the result reached in Glesby was inconsistent with decisions following *Auto Chevrolet*, including the decision reached in *Platt Brothers, supra*. See also *Alleghany Warehouse Company, Inc., and Star Warehouse Corporation*, 256 NLRB 44 (1981), in which Member Jenkins, again in dissent, pointed out that the majority's refusal to apply *Auto Chevrolet* to the facts of that case was inexplicable given that *Auto Chevrolet* had been applied in *High Standard, supra*, a case which was on all fours with the facts considered in *Alleghany*.[11]

In sum, I can conclude only that the Board's putative adherence in principle to *Auto Chevrolet*, coupled with its apparent willingness to abandon its application in practice, only leads to confusion on the part of our regional directors and the labor bar. For my part, I endorse as the most sensible route out of this particular morass the proposal, first advanced by the dissent in *Auto Chevrolet*, that the regional directors serve on all parties copies of objections which have been timely filed with the Region. Such an approach, already undertaken routinely with respect to unfair labor practice charges and representation petitions, would require little additional administrative effort or expense on the part of Regional Offices but would save the Regions, the Board, and the parties considerable time and expenditure which result from the consideration of cases such as the instant one. Accordingly, I favor a revision of our rules to reflect that the Regions will serve copies of timely objections on all necessary parties to the election proceeding and I commend such an approach to my colleagues.

[11] In spite of the position he set out in *Glesby supra*, Member Jenkins now finds that case distinguishable from this one, but the distinction is ephemeral. In *Glesby*, where Member Jenkins would have dismissed the objections, the employer in good faith believed he had properly served the union but, in fact, had not, due to clerical inadvertence. Here, the Employer also in good faith believed it had served the Petitioner but, in fact, had not, also due to clerical inadvertence. The only difference in the two situations is that in *Glesby* the employer ended up serving no party, other than the Regional Office, while here the Employer served the wrong party, along with the Regional Office. This is a distinction without a difference, and Member Jenkins' observation that in *Glesby* there was "no attempt at service" is wide of the mark. Rather, in *Glesby*, just as here, the employer thought there had been proper service but that service had failed.